

Ly (Migration) [2018] AATA 1382 (6 April 2018)

CORRIGENDUM

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Uyen Ching Ly

CASE NUMBER: 1722226

DIBP REFERENCE(S): BCC2017/1277914

MEMBER: Penelope Hunter

DATE OF DECISION: 6 April 2018

**DATE CORRIGENDUM
SIGNED:** **19 April 2018**

PLACE OF DECISION: Sydney

AMENDMENT: The following corrections are made to the decision:

1.

- Paragraph 2, 6, 30 and 31 of the decision should read cl. 500.217.
- The front page of the decision should be replaced with;
Public Interest Criterion 4020 for the purposes of
cl.500.217 of Schedule 2 to the Regulations.

2.

Penelope Hunter
Member



Administrative Appeals Tribunal 3.

4.

5.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Uyen Ching Ly

CASE NUMBER: 1722226

DIBP REFERENCE(S): BCC2017/1277914

MEMBER: Penelope Hunter

DATE: 6 April 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:

- Public Interest Criterion 4020 for the purposes of cl.500.317 of Schedule 2 to the Regulations.

I, Member Penelope Hunter, certify that this is the
Tribunal's statement of decision and reasons

Statement made on 06 April 2018 at 1:54pm

CATCHWORDS

Migration – Student (Temporary) (Class TU) – Subclass 500 (Student) – False and misleading information – Date of the marriage certificate – Applicant left Australia to register marriage in Vietnam – Declaration of Marriage Registration form is a separate process to issuing a marriage certificate – Legitimate document

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2 cl 500.217 Schedule 4 Criteria 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 August 2017 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 30 August 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.317 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that there was evidence that the applicant had provided, or caused to be provided, a bogus document or false or misleading information. This was because a marriage certificate submitted by the applicant was recorded as being signed and registered on 8 November 2016 in Vietnam, and according to Departmental records, the applicant was not in Vietnam at that time having re-entered Australia on 26 October 2016.
8. The applicant appeared before the Tribunal on 1 March 2018 to give evidence and present arguments.
9. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.317 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. Prior to the Tribunal hearing the applicant provided 241 folios of submissions that addressed primarily the length and genuineness of her relationship with Mr Phan Khanh Hung. The Tribunal discussed with the applicant and her representative that upon review the issue for the Tribunal was whether the marriage certificate supplied was a bogus document.
17. At the hearing, the applicant gave evidence that she had attended the registry office in with Mr Hung on 21 October 2016 with the intention of getting married. The registry officer could not issue them with a marriage certificate on that day as they had to clarify her marital status with her home province. The applicant discussed with the Tribunal the process of attending the office of the People's Committee, the forms she presented and what she understood that she was signing. She claimed to have been interviewed by an officer at the time.
18. The Tribunal questioned the applicant as to whether there were any witnesses to the ceremony or any photographs to support the event. She told the Tribunal that as her mother had died in November 2015, less than 12 months earlier, custom prevented them from celebrating the marriage so they had just gone to register the marriage together. There were no photographs as they had not informed family. It was claimed that witnesses were not necessary for a civil marriage in Vietnam.
19. At the request of her representative the applicant was provided with leave following the hearing to provide additional documents addressing the registration of the marriage certificate provided.
20. The applicant has submitted the following further relevant material;
 - i. Confirmation letter, and translation, from Tran Van Vinh, a judicial and civil status officer of the people's committee of Phu Ly Province who processed the marriage application. *Mr Vinh states that on 21 October 2016, Mr Phan Khanh Hung and Mrs Ly Uyen Ching came to the People's Committee of Phu Ly Commune to meet him*

and make a marriage registration declaration on the basis of a voluntary spirit of them. Due to legal elements, we must have the time to verify the marital status of Mrs Ly Uyen Ching due to she does not live at the local managed by us. After consideration that they have enough condition to registered the marriage so we officially issued the marriage certificate on November 08, 2016.

- ii. Letter from the parents of Mr Hung, confirming knowledge of the applicant and Mr Hung's intention to register their relationship.
 - iii. Statement of Mr Hung and translation. Mr Hung which sets out the following; *I make this to confirm that we came to the People's Committee of Phu Ly Commune to register the marriage on October 21, 2016. Both of us filled in full information and jointly signed on the marriage registration declaration and also submitted full records required by the People's Committee (my wife still being in Vietnam at that time). But my wife has permanent address at Ward 9 District 11, Ho Chi Minh City (different management from local authority) the People's Committee of Phu Ly Commune must verify my wife's marital status with the local authority where my wife resides. Until November 08, 2016, the People's Committee of Phu Ly Commune just issued officially the marriage certificate no. 132/2016 for us.*
 - iv. Declaration of Marriage Registration, and translation, dated 21 October 2016.
 - v. Consular authentication provided by Ho Chi Minh Department of External Relations – Ministry of Foreign Affairs of the Social Republic of Vietnam. It was submitted that according to the law of Vietnam, Consulate legalisation consists of determination and certification of the authenticity of signatures on documents and compliance thereof with the laws of the state of their origin.
21. The Tribunal has also reviewed relevant country information. It is noted that new marriage laws were introduced in Vietnam effective from 1 January 2015¹. Upon review this sets out the conditions for getting married and the Articles refer to marriage registration. Relevantly it provides that a marriage shall be registered with a competent state agency in accordance with the law on civil status. The Tribunal accepts that the People's Committee of Phu Ly Commune was a competent state agency.
22. The Tribunal has also considered Decree no.126/2014/ND-CP issued by Vietnam Government on 31 December 2014 provided in detail articles and measures for the implementation of the Law on Marriage and Family 52/2014/QH13 (effective 15 February 2015).² This deals with marriage involving foreign nationals and non-resident Vietnamese, not two Vietnamese residents as is the case with the applicants. However relevantly, Chapter III of the Decree outlines the marriage registration process, particularly Articles 19 to 26. These Articles record the steps such as the presentation of relevant documents, the presentation of a dossier and the need for certification from a competent authority of marital status. Article 22 provides that the time limit for the settlement of marriage is 25 days from when the provincial-level justice receives a valid dossier.³ This information would appear to support the submissions of the applicant that there is a distinction in Vietnam between the act of declaring and intention to marry and filing relevant documents and the registration of a marriage. It also does not record that witnesses are required upon marriage registration.

¹Law No.52/2014/QH13 on Marriage and Family, Socialist Republic of Vietnam, 19 June 2014 (effective 1 January 2015), DMS Law Firm, CISEFCB23F7557

²Decree No.126/2014/ND-CP Detailing a number of articles and measures for implementation of the Law on Marriage and Family, Socialist Republic of Vietnam, 31 December 2014 (effective 15 February 2015), DMS Law Firm, CISEFCB23F7556

³As above

23. The Tribunal has also had regard to the further information regarding the implementation of the Decree contained in Circular no.02a/2015/TT-BTP issued by Ministry of Justice on 23 February regarding a marriage registration ceremony,⁴ particularly Article 9. While the Tribunal is not satisfied that the applicants attended a further marriage registration ceremony, it is not satisfied that the provisions regarding this further ceremony apply to two Vietnamese nationals marrying. The Tribunal has been unable to locate relevant English translations for these particular circumstances.
24. The Tribunal has considered the evidence and documents submitted by the applicant. It is consistent. The Declaration of Marriage Registration form is accepted to be a separate document to the actual Marriage Certificate. The Department's movement records document that the applicant was not in Australia on 21 October 2016. It is accepted that the applicant attended to register her marriage with Mr Hung on 21 October 2016 in Vietnam, as is demonstrated by the Declaration of Marriage Registration form, the oral evidence of the applicant, and the statements of Mr Hung, and judicial and civil status officer Tran Van Vinh. It is accepted that this is a separate process to the issue of a marriage certificate. The Tribunal further accepts that this is an administrative process may occur several days after the application for registration. The Tribunal therefore finds that the fact that the applicant returned to Australia on 26 October 2016, before the marriage certificate was issued on 8 November 2016, does not of itself demonstrate that the marriage certificate was bogus.
25. The Tribunal has found relevant country information to support the claim by the applicant that due to the death of her mother she was not permitted by custom to marry Mr Hung for at least a year from November 2015. A March 2018 article by SBS on Vietnamese culture contains the following information;

*There are a few cultural beliefs that may influence the timing of marriage in some families. Certain years are considered luckier than others (see 'Superstitions' in Other Considerations), and if a family member dies, it is considered customary not to marry until at least one to three years after the death (depending on whom the person was).*⁵
26. Additional information supporting the existence of this custom was also found in a relevant report about Vietnamese death rituals published in 2000, which states as follows;

27. *The length of the mourning period depends on the relationship between the deceased and the bereaved. Generally, it is two years for immediate family members. When this formal mourning period is over, it is permissible for the bereaved to plan major life changes such as marriage.*⁶
28. Finally the Tribunal has considered the stamped Consular Authentication of the applicant's marriage certificate. It is accepted that the relevant Vietnamese authorities consider that the Marriage Certificate is authentic.
29. Therefore the Tribunal finds that the claims of the applicant regarding the circumstances that gave rise to the issue of her marriage certificate on 8 November 2016, after she had departed the country as plausible. It is accepted that marriage customs and the process of registration is different in Vietnam to Australia. It is accepted that a marriage in Vietnam may be registered after an application for registration is made, and a certificate subsequently will be recorded as being issued.
30. Considering all the information that is now available, the Tribunal is not satisfied that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant

⁴ Circular No.02A/2015/TT-BTP Guiding the Decree No. 126/2014/ND-CP of the Law on Marriage and Family, Socialist Republic of Vietnam, 23 February 2015, Vietnam Law in English, CISEC96CF110201

⁵ "Vietnamese Culture", *Special Broadcasting Services (SBS)*, 19 March 2018, CIS7B83941495

⁶ Death Rituals in Vietnamese Society, *EthnoMed*, 1 December 2000, CXAD4E4AA3162

assessing authority or a Medical Officer of the Commonwealth a 'bogus document', as defined in s.5(1), or information that is false or misleading in a material particular' as defined in cl.4020(5). Therefore, the applicant meets cl.4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

31. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
32. There is no evidence before the Tribunal that the applicant or Mr Hung has been refused a visa in the relevant period because of a failure to satisfy cl.4020(1). Therefore, cl.4020(2) is met.

Has the applicant satisfied the identity requirements?

33. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal to suggest that there has been any information given by the applicant to raise concerns regarding her identity. Accordingly, the Tribunal is satisfied as to the identity of the applicants. Therefore, the applicant meets cl.4020(2A).

34. Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

35. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
36. There is no evidence before the Tribunal that the applicant has been refused a visa in the relevant period because of a failure to satisfy cl.4020(2A). Therefore cl.4020(2B) is met.
37. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.500.317.

DECISION

38. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:
 - Public Interest Criterion 4020 for the purposes of cl.500.317 of Schedule 2 to the Regulations.

Penelope Hunter
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...